

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT HUNTINGTON

OHIO VALLEY ENVIRONMENTAL  
COALITION, INC., and WEST  
VIRGINIA HIGHLANDS  
CONSERVANCY, INC.,

Plaintiffs,

v.

CIVIL ACTION NOS. 3:07-00413,  
3:08-00088,  
3:09-01167

APOGEE COAL COMPANY, LLC, and  
HOBET MINING, LLC,

Defendants.

Huntington, West Virginia  
August 12, 2010

TRANSCRIPT OF BENCH TRIAL - DAY 4  
BEFORE THE HONORABLE ROBERT C. CHAMBERS  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:

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                                      BLAIR M. GARDNER, ESQ.  
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Also Present for Patriot:    RICHARD VERHEIJ, ESQ.

Court Reporter:           TERESA M. RUFFNER, RPR  
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Proceedings recorded by mechanical stenography; transcript  
produced by computer-aided transcription.

1 Thursday, August 12, 2010, at 12:58 p.m. in open court

2 THE COURT: All right. Are we ready to proceed?

3 MR. LOVETT: We are, Your Honor.

4 THE COURT: All right. Do you want to explain where  
5 the parties are at this point?

6 MR. LOVETT: Well, I'll give it a go and see. We  
7 met this morning, most of the morning. I think we have some  
8 ideas that we share in common, but we did not resolve our  
9 differences. I think that if the Court gave us a couple of  
10 more days, we may be able to do that.

11 We would like -- I know the Court is busy next week, or  
12 at least that was the plan a couple of weeks ago, but we  
13 would, I think, like to come back and reschedule closing  
14 arguments for sometime next week, early next week, if you have  
15 an hour. If we aren't able to resolve it, we can come back  
16 and tell the Court. The parties would like to do that on  
17 Tuesday afternoon, understanding that the Court's schedule may  
18 not allow that.

19 THE COURT: Well, we're in luck because the case  
20 that I had set for trial next week, which was obviously not  
21 going to settle, is being continued because it was a Fourth  
22 Amendment case and was a qualified immunity question that I  
23 resolved, and the defendants filed a notice of appeal  
24 yesterday or the day before. So it's going to go up on an  
25 interlocutory appeal. As a result, it's having to be

1 postponed.

2 So I could do this next Tuesday afternoon.

3 MR. LOVETT: Thank you.

4 THE COURT: So, first, does the defense intend to  
5 offer any further evidence?

6 MR. HURNEY: No, Your Honor.

7 THE COURT: All right.

8 MR. HURNEY: We would rest at this point.

9 THE COURT: All right. So the parties then, I  
10 guess, would like the Court to schedule a proceeding Tuesday  
11 afternoon to either entertain a settlement or, if no  
12 settlement is reached, closing arguments and submission of the  
13 case for decision.

14 MR. LOVETT: Yes, Your Honor. And we don't think --  
15 I mean I know the Court probably doesn't want long closing  
16 arguments, so I would think an hour for a hearing would be  
17 sufficient.

18 THE COURT: Well, that will be fine. That's what  
19 we'll do.

20 Have you reached agreement on anything, or is  
21 everything -- I mean I realize in cases like this, unless  
22 everything is agreed, maybe nothing is, but --

23 MR. LOVETT: I think that we've reached an agreement  
24 on nearly every issue. I think there's one outstanding issue,  
25 and I'm sure the Court, you know, understands that it's a flow

1 issue and the cost of treating that flow. And I think it's  
2 fair to say that's what we're talking about.

3 THE COURT: Well, just so I'm clear, so you think at  
4 this point the biggest issue separating the parties is  
5 determining the amount of flow that should be designed into  
6 this treatment system?

7 MR. LOVETT: Yes, and the amount of the letter of  
8 credit that would be submitted to guarantee that construction  
9 of a plant to treat that flow. I think everything else is --

10 MR. HURNEY: Yeah, I think that's fair. There's  
11 other things that surround that that I think if we can get  
12 resolution of that, the others are little differences, but I  
13 think Mr. Lovett is accurate.

14 We just -- you know, Your Honor, this is a publicly  
15 traded company, and part of our obligation is getting all the  
16 information back so we can get something approved. And so  
17 that's where, you know, from a timing standpoint, that's  
18 really part of the issue. So I'm sure the Court understands.

19 THE COURT: All right. Well, that's acceptable to  
20 the Court, then.

21 MR. LOVETT: Your Honor, one bit of housekeeping. I  
22 think the Court admitted all the joint exhibits at once; is  
23 that right?

24 THE COURT: I think specifically I've admitted all  
25 of the joint exhibits that were used in questioning any

1 witnesses. I've still got a box of joint exhibits here that  
2 no one addressed.

3 MR. LOVETT: Well, all the ones that were used  
4 for -- that any witness used have been admitted.

5 THE COURT: And I think that's true whether it was a  
6 defendant's exhibit, a plaintiff's exhibit, or a joint  
7 exhibit.

8 MR. LOVETT: I don't think you moved the admission  
9 of one exhibit for last Wednesday. That is a joint exhibit.  
10 So it's my understanding that has been admitted.

11 THE COURT: Mine, too.

12 MR. HURNEY: I'm thinking, Judge, about whether  
13 there were three -- and I'm sorry, I don't have the numbers  
14 here, but three exhibits related to the VSEP project that I  
15 used during the testimony of the witnesses.

16 THE COURT: Was that the CH2M Hill comments and  
17 report back --

18 MR. HURNEY: Yes.

19 THE COURT: Those were identified and used, and I  
20 consider those to be part of the exhibits admitted.

21 MR. HURNEY: Thank you, Your Honor.

22 CLERK JUSTICE: The last witness's CV I don't think  
23 was moved.

24 THE COURT: And apparently there was no formal  
25 motion on the CV for the last witness, but it's admitted as

1 well. So, again, I'm going to treat everything that was used  
2 to question the witness as admitted.

3 All right. Well, is there anything else we need to do,  
4 then, at this point?

5 MR. HURNEY: No, Your Honor.

6 MR. LOVETT: No.

7 THE COURT: If not, we'll stand adjourned until 1:30  
8 next Tuesday.

9 MR. TEANEY: Thank you, Your Honor.

10 THE COURT: Good luck.

11 (Proceedings adjourned at 1:04 p.m.)  
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21 I, Teresa M. Ruffner, certify that the foregoing is a  
22 correct transcript from the record of proceedings in the  
23 above-entitled matter.

24 s/Teresa M. Ruffner

November 29, 2010

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